SBC, Ameritech and CU attempt to bridge the gap between their allegations and the economic realities by reference to allegations made by the Federal Trade Commission ("FTC") in connection with Time Warner's 1996 transaction to acquire Turner Broadcasting. But the FTC has long stressed that its unproven allegations settled by entry of a consent decree do not have precedential value. *See Beatrice Foods Co.*, 86 FTC 1 (1975) (citing *United States v. DuPont Co.*, 366 U.S. 316, 330 n.12 (1961)) ("[A] consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record").[117]

In all events, whatever the merit of the FTC's concerns in the 1996 deal, they are not remotely plausible here. As described above, AT&T will continue to have no control over (or economic interest in) Liberty's programming; the Time Warner programming (and cable) interests managed by the TWE partnership in which MediaOne has a minority interest will remain completely insulated from AT&T control; and the directly-held MediaOne programming interests that AT&T will acquire are, by any measure, insignificant.[118] Most fundamentally,

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appealed. *Id.* at 1301 (emphasis added). Rather, the appellate court addressed only the district court's holding that certain "exclusive-dealing" arrangements were an "unreasonable restraint of trade" in violation of the Section 1 of the Sherman Act. *Id.* at 1301-05.

[117] *See also Langton v. Hogan*, 71 F.3d 930, 935 (1st Cir. 1995) ("The way in which a consent judgment or consent decree resolves, between the parties, a dispute over a legal issue is not a ruling on the merits of the legal issue").

[118] *See generally* Coffee Decl. & Coffee Supp. Decl. By virtue of this insulation, even if vertical foreclosure were somehow possible despite the many non-AT&T outlets available to unaffiliated programmers, Liberty shareholders, not AT&T, would receive any economic benefit to Liberty programming interests favored by such foreclosure. The significant costs to AT&T of such a
(continued . . .)

however, the consent order entered by the FTC already *forbids* Time Warner from engaging in the discrimination against unaffiliated programmers that SBC, Ameritech, and CU posit and would have the Commission attribute to AT&T.[119] Therefore, this Merger cannot have the potential effects that were raised by the FTC.

Finally, GTE points to the Commission's 1993 statement that the need to assure a diversity of information sources might support limits below what traditional antitrust analysis would support.[120] As explained above and in the Public Interest Statement, limits approaching AT&T's post-Merger size *are* well below those that traditional analysis would support. More fundamentally, once concerns about the size and number of MSOs are untethered from the economic rationales of monopsony and vertical foreclosure, there is no obvious – and certainly no demonstrated – link between those concerns and the diversity of information sources available to any MSOs customers.

(. . . continued)
strategy – from the customers lost by refusing to carry popular programming – would deter AT&T from attempting foreclosure even if it had the ability. *See* CRA Report at 44-50. *See also* Bruce M. Owen & Steve S. Wildman, *Video Economics* 235-36 (1992) ("It is in the economic interest of MSOs to encourage new program services, because new program services enhance the demand for cable service").

[119] Of course, existing Commission rules that apply to *all* cable operators also, *inter alia*: (1) prohibit a cable operator from causing an affiliated programmer to "improperly influence the decision of such vendor to sell, or unduly or improperly influence such vendor's prices, terms and conditions," 47 C.F.R. §§ 76.1001, (2) prohibit a cable operator from discriminating against an unaffiliated programmer in the terms or conditions of carriage based on the programmer's nonaffiliation with the cable operator, 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c), and (3) require cable operators to set aside significant capacity on their cable systems to non-affiliated video programmers at reasonable rates. 47 U.S.C. § 532; 47 C.F.R. § 76.970 *et seq.* Moreover, as discussed below, as the Commission has gained more experience with these issues, it has strengthened and expanded these rules.

[120] GTE at 12. *See also* CU at 15-17.

Consumers buy programming *locally*. Whether the owner of the MSO in Dallas also owns the MSO in Atlanta has no impact whatever on the diversity of information sources available to viewers in either Dallas or Atlanta. In either case, viewers in each city have access to whatever information the MSO *in their area* provides, in addition to the information supplied via satellite, broadcast, Internet, telephone lines and the myriad other vehicles for delivering information.[121] Nor can there be any claim that large MSOs are less likely to offer diverse programming than their smaller counterparts or that program diversity decreases as concentration increases. Indeed, the available empirical data suggest that the opposite is true.[122] Program diversity, over both cable and the many alternatives to cable, has dramatically increased even as MSO concentration has increased.[123]

In short, the commenters that address the issue provide no coherent theory how AT&T could exercise monopsony power or foreclose rival programming. And, the skyrocketing prices that AT&T and other MSOs pay unaffiliated programmers[124] lend an air of unreality to Opponents' claim that AT&T will have the upper hand. This disconnect largely reflects a failure to acknowledge key factors in the bargaining power equation. Video programmers are often

[121] *See, e.g.*, Owen & Wildman, *supra* note 118, at 236 ("cable MSOs are not the only gatekeepers" of information).

[122] *See* CRA Report at 42-45 & Appendix D; Stanley M. Besen and John R. Woodbury, "An Economic Analysis of the FCC's Cable Ownership Restrictions," at A-1 (Aug 14, 1998) (attached to Comments of TCI, *In the Matter of Implementation of Section 11(c) of Cable Television Consumer Protection and Competition Act of 1992 – Horizontal Ownership Limits*, MM Docket No. 92-264 (Aug. 14, 1998)).

[123] As described in the Public Interest Statement and in the Commission's Annual Competition Reports, there has been a dramatic increase in the deployment of new technologies capable of bringing both video programming and other information directly to the consumer. *See, e.g.*, Public Interest Statement at 46-54; *Fifth Annual Video Competition Report* ¶ 102 & n.451.

[124] *See, e.g.*, Bond Decl. ¶ 9; *Fifth Annual Video Competition Report* ¶¶ 9, 24.

themselves very large and sophisticated commercial actors that hold *exclusive* rights to unique programming content that subscribers demand and without which an MSO would be competitively handicapped.[125] This "clearly mitigates" any "buying power."[126] MSO "buyer power" is further constrained by the existence of alternative outlets for video programming, including not only direct cable competitors like DBS, but also numerous broadcast, international cable, and videotape outlets.[127] Any remaining concern about MSO monopsony or vertical foreclosure is dispelled by the digital and other cable upgrades that increase channel capacity and thus MSO *demand* for more and more distinct programming.[128] These factors, together with the undeniable force of DBS competition, explain both why the video programmers have stayed on the sidelines in this proceeding and why the claims of others that AT&T will squeeze programmers are entirely without merit.

3. The Merger Will Not Violate the Cable Act or the Commission's Rules.

Unable to show that the Merger has any anticompetitive impact on video programming, the ILECs and other AT&T competitors raise various Cable Act-related objections and propose a number of conditions to the proposed Merger. As shown below, these objections and proposed conditions are without merit and should be rejected.

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[125] *See* Bond Decl. ¶¶ 4-5. It is well established that highly differentiated products such as video programming are not perfect substitutes and that firms that manufacture highly differentiated products are more capable of unilaterally exercising market power. *Horizontal Merger Guidelines* § 2.21.

[126] Michael E. Porter, *Competitive Strategy: Techniques for Analyzing industries and Competitors* (1980). *See also* Bond Decl. ¶¶ 3-9.

[127] *See* CRA Report at 40.

[128] *See United States v. Syufy Enterprises*, 903 F.2d 659, 670-71 (9th Cir. 1990) (recognizing that purchasers who have excess capacity are in an extremely weak bargaining position).

a. **Horizontal rules.**

i. **The Merger will not violate any Commission rule or statute concerning horizontal concentration.**

Several Opponents urge the Commission to deny the Merger because the post-Merger AT&T will exceed the cable horizontal ownership limit.[129] However, after the D.C. District Court found the statutory horizontal ownership provision unconstitutional, the Commission voluntarily stayed its 30 percent homes-passed limit[130] and affirmed this stay just last year.[131] Thus, there is no horizontal ownership limit currently in effect that the post-Merger AT&T will exceed. For this reason alone, the Commission should deny these claims.

Denial of these claims is also warranted by AT&T's commitment to the Commission that if and when the court pronounces the statutory provision constitutional, "AT&T will comply with whatever ownership limits emerge from the current judicial and Commission proceedings."[132] In fact, the Commission has already made clear that such a result would be required,[133] and so no further action by the Commission is necessary to ensure compliance with any future horizontal ownership limit that passes constitutional muster.[134]

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[129] Ameritech at 7-9; Bell Atlantic at 7-9; CU at 4-13; GTE at 7-14; SBC at 11-14; U S West at 4-13.

[130] *See* Second Report and Order, *In the Matter of Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 - Horizontal and Vertical Ownership Limits,* 8 FCC Rcd. 8565, ¶ 3 (1993) ("*Horizontal Ownership Order*").

[131] *See Horizontal Ownership Further NPRM* ¶ 75.

[132] Public Interest Statement at 67.

[133] *See Horizontal Ownership Further NPRM* ¶ 77.

[134] SBC and CU claim that AT&T failed to provide in its Applications a certification regarding homes passed required by 47 U.S.C. § 76.503(c). However, as AT&T recently explained in its opposition to CU's motion to dismiss the Application, this is simply not true. Rule 76.503(c)

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ii. Current marketplace conditions justify adoption of AT&T's proposed amendments to the cable horizontal ownership rule and the underlying attribution rule.

Opponents' claims that the Commission should deny the Application because AT&T post-Merger will exceed 60 percent of cable homes passed are pure sophistry. The Commission has already tentatively concluded that its cable homes-passed rule should be changed in the pending *Horizontal Ownership Further NPRM*.[135] More fundamentally, the Opponents completely ignore marketplace and regulatory developments since 1993 that effectively "check" any MSO's ability to engage in the type of conduct that the cable horizontal ownership limit is designed to prohibit – *i.e.*, extracting unfair concessions from programmers (monopsony power), foreclosing entry by rival programmers (vertical foreclosure), or otherwise reducing program diversity. The most important of these checks are the following:

- *The increase in MVPD competition.* When the Commission adopted the suspended horizontal rule in 1993, DBS had not even been launched. Today, DBS has over 10 million subscribers. It is a fact that programmers today have *many* more alternatives than they did in 1993, and this reduces the ability of any MSO to harm the programming market.[136]

- *Other regulations that target the very same concerns addressed by the horizontal ownership limit.* A number of other cable regulations, including the must carry, program carriage, channel occupancy, PEG access, and leased access rules,

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requires no such certification in an application for transfer of control – or, indeed, *any* certification in an application. Rather, the rule requires only that the necessary certification be made "[p]rior to acquiring additional cable systems." *See* Opposition of AT&T Corp. and MediaOne Group, Inc. to Motion to Dismiss, CS Docket No. 99-251, at 1 (filed Aug. 23, 1999). Moreover, even though AT&T was not required to provide any certification under Section 76.503(c) in its Applications, the Applications did in fact include the relevant cable homes passed information – both before and after the Merger.

[135] *See Horizontal Ownership Further NPRM* ¶¶ 80-81, 84-86.

[136] *See* Public Interest Statement at 46-54; and Section II.A, *supra*. *See also* Comments of AT&T on Video Competition NOI, CS Docket No. 99-230, at 1-21, filed August 4, 1999.

already prohibit MSOs from acting in ways that harm programmers or reduce diversity. Moreover, the experience the Commission has gained with these rules reveals that they have been an effective method of checking any possible monopsony and vertical foreclosure power that MSOs may possess, and of ensuring programming diversity.[137] For example, in the six years since their adoption, not a single complaint has been filed under the channel occupancy rule and the only program carriage complaint was settled by the parties. This strongly supports AT&T's view that the concerns underlying the cable horizontal ownership limit are less significant today than they were thought to be in 1993.[138]

- *Digital deployment.* Digital technology is already expanding channel capacity. By providing programmers with additional capacity for distribution of their program services, digital technology further reduces concerns about harm to the programming market. In fact, the Commission already has acknowledged that expanded channel capacity has the effect of discouraging cable operators from exercising monopsony power, engaging in vertical foreclosure, or otherwise reducing diversity. This is the very reason the Commission decided not to apply the channel occupancy limit for channels in excess of 75 on a given cable system.[139]

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[137] Moreover, some of these rules have been strengthened and expanded since the Commission originally considered them in the context of the horizontal ownership limit. For example, the Commission has significantly enlarged the rights of complainants under the leased access and program access rules, and the Supreme Court has affirmed the constitutionality of the must carry rules. *See* Comments of TCI, MM Docket No. 92-264, at 21-26 (filed August 14, 1998), for a more detailed discussion of the experience with, and strengthening of, these rules since 1993.

[138] Thus, GTE's (at 12) and U S West's (at 11) arguments that the Commission already considered these rules when it adopted the 30 percent homes-passed limit are inapposite. Because the Commission had little experience with these regulations at the time the suspended horizontal rule was adopted, it was not able to give them adequate weight. Similarly Opponents' suggestion that these other rules are not as effective as "structural" regulations is plainly wrong. For example, the channel occupancy rule is a structural, "easy-to-detect" and "easy-to-enforce" regulation (to use the Commission's terminology). The must carry rule is also not a behavioral regulation and, like other structural regulations, is easy to detect and enforce.

[139] *Horizontal Ownership Order* ¶ 83 ("We continue to believe that expanded channel capacity will reduce the need for channel occupancy limits. . . . [T]he expanded channel capacity that will result from fiber optic cable and digital compression technology will help obviate the need for such limits as a means of encouraging cable operators to carry unaffiliated or competing video programming services. . . . [T]he record indicates that vastly larger cable systems will likely be inclined to deliver targeted 'niche' video programming services aimed at correspondingly smaller audience sizes").

The Commission itself has provided dramatic evidence that concerns about the programming market are far less significant today than they were in 1993. It has pointed out year after year in its annual competition reports that independent programming sources have exploded over the last six years,[140] despite the fact that the horizontal ownership limit has never been enforced during this period and that AT&T has already acknowledged in its periodic Section 76.504(c) notification letters to Commission that it is over the suspended homes-passed limit. And even as they increase in number, video programmers have been rapidly escalating the license fees they demand (and get) from MVPDs – irrefutable evidence that in today's competitive environment the programming sellers are in a strong bargaining position and are in little need of protection from the overly restrictive Commission rules.[141]

The foregoing developments *alone* justify changes to the horizontal ownership limit and associated attribution rules. Moreover, AT&T has proposed to modify the attribution rules in ways that would further protect against any conceivable harm to the programming market. Under AT&T's proposal, an MSO would not bee deemed to have an attributable interest where the following two conditions were met:

1) *The MSO may not buy programming for the system.* This requirement directly addresses the concern that an MSO could use an interest in a cable system to obtain unfair concessions from programmers (monopsony power). An MSO would derive no additional buying power from a cable system for which it does not purchase programming, even if the MSO has a minority interest in the system.

2) *The MSO may not be involved in, or have access to any information regarding, the programming decisions of the system.* This requirement directly addresses concerns about vertical foreclosure and reducing program diversity. If an MSO agrees not to be involved in a cable system's programming choices and not to have access to any information regarding such programming (including

[140] *See* Section II.A.1, *supra.*

[141] *See* Bond Decl. ¶ 9.

> programming contracts), then it cannot pursue a strategy of foreclosing a rival program service on that system or of slanting the programming toward the MSO's viewpoint.

AT&T recognizes that several parties objected to the discussion of the "no program purchase or control" rule in the Public Interest Statement, claiming that a focus on "control" over programming decisions ignores the Commission's concerns about influence.[142] Although AT&T continues to believe that a focus on control serves the underlying purposes of the cable horizontal ownership rule, the "no program purchase or involvement" focus unquestionably answers these questions.[143]

Adoption of AT&T's proposed test is further supported by the significant benefits to local telephone and broadband competition that the Merger will create, as discussed, *supra*, and in the Public Interest Statement. When Congress adopted the horizontal ownership provision in the 1992 Cable Act, it specifically instructed the Commission to take account of the fact that cable networks were evolving rapidly and had the potential to provide consumers with a vast array of new technologies and services.[144] When Congress spoke again in the 1996 Act, it emphasized the need to develop local telephony and broadband competition, and noted the unique role that cable companies could play in developing such competition. And when the

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[142] CU at 12-13; GTE at 13-14.

[143] To implement this rule in the most efficient manner possible, the MSO could be required to certify to the Commission that it complies with these two conditions in order to avoid attribution under the horizontal rules. As AT&T has previously noted, such a certification process is well-established under Commission precedent regarding attribution. *See* TCI Comments, CS Docket No. 98-82, at 19-25 (filed Aug. 14, 1999).

[144] For example, Congress mandated that the Commission "account for any efficiencies and other benefits that might be gained through increased ownership or control" of cable systems, 47 U.S.C. § 533(f)(2)(D), and that it adopt rules that "reflect the dynamic nature of the communications marketplace," *id.* § 533(f)(2)(E).

Commission approved the AT&T-TCI merger, it noted that it is "committed to ensuring that residential local exchange competition becomes a reality *sooner rather than later*."[145] It would be absurd and unfortunate if AT&T's customers were denied the 1996 Act's promised benefits – competitive local telephony and new broadband services – because of a needlessly restrictive limit on cable horizontal ownership.

iii. AT&T did not ignore the Commission's existing attribution Rules.

Contrary to the claims of a few parties,[146] the Applications did not ignore the Commission's *suspended* attribution rules when discussing AT&T's size post-Merger. Appendices A and B of the Public Interest Statement contain, among other things, a list of all cable systems in which AT&T and MediaOne hold interests (including systems in which AT&T or MediaOne hold only partial interests and do not purchase or control programming), so that any party can determine which systems would be potentially attributable to AT&T even under the current attribution rules.

Proposals that the Commission apply the broadcast attribution rules are misguided. The broadcast rules were developed specifically to prevent anticompetitive practices between *competing* broadcasters. The fundamental concern underlying these rules is that competing broadcasters will exert horizontal market power that will diminish competition and program diversity in the *local* market. As Drs. Besen, O'Brien, Woodbury, and Moresi describe:

> The Commission is concerned about local broadcast market competition because if one broadcast station acquires a silent financial interest in a rival broadcast station in the same

[145] *AT&T-TCI* ¶ 48 (emphasis added).

[146] *See* CU at 12-13, 22-24; GTE at 13-14; U S West at 7-10.

geographic area, the investing station may have a reduced incentive to compete for advertisers and viewers. This is because some of the advertisers and viewers who would switch to the investing station if it lowered advertising rates or improved programming will be drawn from the acquired station. Because the investing station shares in the profits of the acquired station by virtue of its financial interest, its incentives to compete with that station are thereby reduced.[147]

By contrast, cable systems do not generally compete with each other in the same geographic areas for subscribers, local advertising revenues, or for programming. Consequently, there is no possibility that acquiring an interest in another cable system will reduce the level of competition among the systems for subscribers or for local advertisers and thus there is no risk that the investment of one cable system in another will result in higher prices to subscribers and advertisers.[148] As the CRA Attribution Analysis concludes, "[t]his suggests that the attribution rules for the cable industry should be more lenient than those for the broadcast industry."[149]

This conclusion is especially true with respect to the cable horizontal ownership limit. As noted, the fundamental concern underlying this limit has nothing to do with preventing market power at the *local* level, but rather with preventing market power at the *national* level.[150] As AT&T has explained in comprehensive economic analyses submitted to the Commission,

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[147] *See* Stanley M. Besen, Daniel P. O'Brien, John R. Woodbury, and Serge X. Moresi, Charles River Associates, "An Economic Analysis of the Effects of Partial Ownership Interests in Cable Systems," August 14, 1998, at 17 (filed as an attachment to the Comments of TCI filed in CS Docket No. 98-82 on August 14, 1998) ("CRA Attribution Analysis").

[148] *See FCC Policy On Cable Ownership: A Staff Report by Kenneth Gordon, Jonathan D. Levy and Robert S. Preece* ¶ 93 (Nov. 1981) ("Only in markets where MSOs compete directly with one another could problems of horizontal market power arise. Thus it is clear at the outset that such [market power] problems cannot arise in the local distribution function of cable, since different systems do not compete directly against one another.") (citations omitted).

[149] CRA Attribution Analysis at 18.

[150] *See Fifth Annual Video Competition Report* ¶¶ 125, 152-153.

these national programming concerns pose smaller competitive and diversity risks than the local market power concerns underlying the broadcast attribution rules.[151]

iv. Failure to allow horizontal ownership of 35 percent for cable, after just raising the limit for broadcasters to 35 percent, would be arbitrary and capricious.

While, as shown above, fundamental competitive differences between the broadcast and cable industries make application of the broadcast attribution rules to the cable industry inappropriate, there is no basis in logic or economics that would permit the Commission to set a lower horizontal ownership limit for cable systems than the 35 percent level it adopted for broadcasters.

In raising the broadcast horizontal ownership limit, the Commission reaffirmed its view of broadcasters as a "uniquely important" distribution mechanism in terms of ensuring programming diversity. "There is consequently a vital public interest in ensuring that these influential outlets for communications are in the hands of a broad number of different owners."[152] But if a 35 percent horizontal ownership limit is not too high to cause concerns about monopsony, vertical foreclosure, or diversity for the "uniquely important" broadcasters, *a fortiori*, it cannot reasonably be viewed as a problem for the cable industry, particularly given the

[151] *See generally* CRA Attribution Analysis.

[152] *See Review of the Commission's Regulations Governing Television Broadcasting,* Television *Satellite Stations Review of Policy and Rules*, MM Docket Nos. 91-221 and 87-8, ¶ 18 (rel. Aug. 6, 1999). The Commissioners echoed these conclusions in their individual statements. Commissioner Ness, for example, observed that "broadcasting remains a distinctly special service – with unique privileges and unique responsibilities." Statement of Commissioner Ness at 2. Commissioner Powell agreed that the "free business model [of broadcasters] is quite unique and . . . warrants some government attention to undue concentration." Statement of Commissioner Powell at 2.

industry's well-established track record in promoting diverse programming notwithstanding increases in MSO size.[153] This is especially true when one considers that under the broadcast limit the Commission only counts 50 percent of homes reached by UHF (and also grandfathers LMAs and exempts satellite TV stations), so that broadcasters are able to own stations that reach substantially more than 35 percent of all television households.[154]

b. Program access rules.

i. The Commission should not subject AT&T's terrestrially distributed programming services to the program access rules.

Certain Opponents claim that the Merger will give AT&T the ability and incentive to circumvent the program access rules by delivering programming terrestrially (as opposed to using satellite delivery). They therefore urge the Commission to condition approval of the Merger on AT&T's commitment to make all its affiliated programming services subject to the program access restrictions, *regardless* of whether they are satellite or terrestrially delivered.[155]

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[153] CU's suggestion that Congress' silence on the cable horizontal ownership limit in the 1996 Act indicates an intent to leave the limit at 30 percent, is exactly backwards. CU at 20-21. It would have made no sense for Congress to include a provision in the 1996 Act addressing the cable horizontal ownership limit because: (1) the statutory provision had been held unconstitutional; and (2) the rule had been stayed. Since no limit was in effect, there was nothing for Congress to increase. Moreover, because the Commission has broad discretion under Section 613(f)(1) to establish a cable horizontal ownership limit, a separate congressional delegation was not required to authorize the Commission to increase this limit.

[154] *See* 47 C.F.R. § 73.355(e)(2). Further, as the Commission has recognized, must carry requirements and other specific restrictions applicable to the cable industry (but not to broadcasters) also ensure the carriage of diverse programming. *See Horizontal Ownership Order* ¶ 54 ("[C]arriage of broadcast, PEG and leased access channels promotes diversity and provides alternative sources of unaffiliated programming to cable subscribers in furtherance of the statutory objectives.").

[155] *See* Ameritech at 12-17; WCAI at 13-19; Bell Atlantic at 17-20.

However, on three occasions within the last year, the Commission has expressly addressed – and rejected – requests to extend the program access rules to terrestrially delivered programming.

In October 1998, the Cable Services Bureau held that the program access provisions apply only to "satellite cable programming," and not to programming that was "previously" satellite-delivered or the "equivalent" of satellite cable programming.[156] In so ruling, the Bureau reached conclusions that dispose of the various contentions raised here:

> In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially delivered. DIRECTV's argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. We find no evidence in Section 628 that Congress intended such a result.[157]

In its August, 1998 order expanding the program access rules in certain respects, the Commission itself concluded that there is no factual basis for extending the rules to terrestrially delivered services, even assuming that the Commission had authority to do so:

> The record developed in this proceeding fails to establish that the conduct complained of, *i.e.*, moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. . . . In circumstances where anticompetitive harm has not been demonstrated, we perceive no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers.[158]

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[156] *See In the Matter of DIRECTV, Inc. v. Comcast Corporation, et al.*, DA 98-2151, ¶ 25 (Oct. 27, 1998).

[157] *Id.* ¶ 32.

[158] *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding*
(continued . . .)

And just a few months ago in its Order approving the AT&T-TCI merger, the Commission affirmed this holdings and specifically rejected the very same arguments and proposals raised in this proceeding to extend the program access rules to AT&T's terrestrially distributed programming.[159]

ii. The Commission should not ban exclusive agreements between AT&T and unaffiliated programmers.

Having failed in recent months to convince the Commission to impose any additional limits on programming exclusivity throughout the industry, Ameritech and others attempt to resuscitate their efforts here, claiming, as they did in the AT&T-TCI merger review proceeding, that approval of the proposed Merger should be conditioned on AT&T's commitment not to enter into exclusive agreements with non-vertically integrated programmers.[160] The Commission should reject this proposed condition for the same reasons it rejected it in the AT&T-TCI merger proceeding.[161]

Opponents provide no new legal or policy basis for their proposed outright ban on all AT&T exclusivity arrangements, an outcome that is directly at odds with the approach taken by

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(. . . continued)
Development of Competition and Diversity in Video Programming Distribution and Carriage, 12 Comm. Reg. (P&F) 1296, ¶ 71 (1998) (citations omitted).

[159] *AT&T-TCI* ¶ 37.

[160] *See* Ameritech at 17-18; BellSouth at 2, 5-7; EchoStar at 6, 8-9; SBC at 23-24; WCAI at 3-5.

[161] *AT&T-TCI* ¶ 38 ("We further decline to condition the merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules. If parties believe any existing exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve such grievances. Commenters have not alleged that existing exclusivity arrangements are unlawful, and we do not find that this merger provides a basis for the Commission to declare unlawful TCI's future exclusivity agreements to the extent they conform with current rules.") (citations omitted).

Congress in the Cable Act.[162] They also fail to recognize that exclusive arrangements can promote efficiencies including, among other things, reduced transaction costs (*e.g.*, dealing with only one distributor for a market) and the elimination of promotional free-riding (which, in turn, creates incentives to promote programming more zealously because the promotional benefits run to the distributor and not its competitors) – efficiencies that the Commission itself has recognized.[163]

Indeed, some of the very same parties who in this proceeding ask the Commission to bar AT&T outright from entering into exclusive arrangements are themselves increasingly using exclusivity as a competitive weapon *against* AT&T and other cable operators. For example, DirecTV has touted its exclusive sports packages (such as "NFL Sunday Ticket,"[164] "NBA League Pass," and "NHL Center Ice") as "not available on cable"[165] and has trumpeted its exclusive music concerts as part of its "tradition of delivering quality programming not available on cable."[166] The

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[162] *See, e.g.*, 47 U.S.C. § 548(c)(2)(C), (D) (permitting exclusivity under all circumstances when there is no vertical integration or no satellite delivery; and permitting exclusivity for vertically integrated programmers in served areas if found to be in the public interest).

[163] *See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd. 5299, ¶ 66 (1988); *see also Program Access Order*, 8 FCC Rcd. 3359, ¶ 65 (1993); *New England Cable News, CSR-4190-P, Memorandum Opinion and Order*, 9 FCC Rcd. 3231, ¶ 37 (1994).

[164] *See Hughes 1998 Annual Report* at 22 (1999) ("DirecTV's important arrangement making it the exclusive small-dish provider of NFL Sunday Ticket has been extended through 2002.").

[165] *See* DirecTV News Release, "DirecTV to Offer Last Six Weeks of '97 NFL Sunday Ticket Free to New Subscribers," (Nov. 3, 1997) <www.directv.com:80/press>; DirecTV News Release, "DirecTV Offers Free Preview of NBA League Pass and NHL Center Ice to Subscribers," (Oct. 3, 1997) <www.directv.com:80/press>.

[166] *See* DirecTV News Release, "Shania Twain's First-Ever Televised Concert to be Broadcast Live Only on DirecTV," (Aug. 17, 1998) <www.directv.com:80/press>; *see* DirecTV News Release, "DirecTV to Air Exclusive Premiere of Tom Petty and Heartbreakers Concert," (July 12, 1999) <www.directv.com:80/press>.

ability of DBS operators to enter into such exclusive arrangements free of the onerous regulations that apply to their cable counterparts is a significant competitive advantage.

iii. The Commission should not mandate the sale of AT&T-affiliated programming at specified volume discounts that exceed the program access rule requirements.

Ameritech requests that approval of the Merger be conditioned upon AT&T's commitment to offer any MVPD the same volume discounts AT&T offers its own affiliated entities.[167] However, just as the Commission rejected CU's proposal to mandate the sale of AT&T-affiliated programming at "market" prices in the AT&T-TCI merger review proceeding,[168] it should reject Ameritech's request here that AT&T provide its programming at specified volume discounts to any and all MVPDs. As the Commission correctly concluded:

> We reject Consumers Union's proposal that the Commission mandate the sale of programming at "market" prices. Neither the merger nor the Commission's rules provide any basis for the imposition of a mandate that Liberty Media price its programming at any particular level, provided the pricing is not unlawfully discriminatory.[169]

There is nothing unique about this Merger that would justify a different conclusion. Moreover, as the CRA Report concludes, more restrictive volume discount rules imposed on AT&T are particularly unjustified given that the economic rationale and data relied on by Ameritech's economic experts are fundamentally flawed.[170]

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[167] *See* Ameritech at 22-23.

[168] *See AT&T-TCI* ¶ 39.

[169] *Id.*

[170] *See* CRA Report at 33-34 ("[Dertouzos and Wildman's ('DW')] estimates of the discount obtained by large cable MSOs are likely to be highly inaccurate and their attempt to ascribe virtually their entire estimated difference to bargaining power on the part of large MSOs is defective because they fail to recognize a large number of cost and efficiency-based explanations that actually exist. . . . [T]he fees paid by cable operators and other MVPDs depend on a wide range of provisions in their contracts with program services. . . . Without taking these, and other,
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c. Channel occupancy rules.

Bell Atlantic contends that AT&T post-Merger will violate the channel occupancy rules because of AT&T's acquisition of interests in MediaOne and TWE programming.[171] Bell Atlantic does not identify any AT&T cable system that it believes would not be in compliance with the channel occupancy rules post-Merger.[172] For this reason alone, the Commission should reject this argument.

Moreover, this Merger proceeding is an inappropriate forum in which to make such generalized allegations. First, the Commission already has an enforcement process in place for handling alleged violations of the channel occupancy rules, and that process should govern here.[173] In fact, this is exactly what the Commission concluded in the AT&T-TCI merger proceeding with regard to program access complaints.[174]

(. . . continued)
differences into account, it simply is not possible to compare the prices paid by different operators, but DW's analysis neither recognizes nor controls for these differences.").

[171] Bell Atlantic at 9-14.

[172] Bell Atlantic states that AT&T is "close to exceeding" the limits in several of its largest markets, and attempts to support that claim by citing the home page of the TV Guide Web site. *Id.* at 11, n.32. That home page, however, makes no reference to AT&T's programming interests in any of its cable systems. *See* <http: //www.tvguide.com> (accessed Aug. 27, 1999).

[173] *See* Second Report and Order, *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal and Vertical Ownership Limits*, Second Rept. and Order, 8 FCC Rcd. 8565, ¶ 99 (1993) ("*Channel Occupancy Order*") (indicating that parties wishing to allege a channel occupancy claim with *respect to a specific system* should notify the relevant LFA or file a particularized complaint with the Commission).

[174] *AT&T-TCI* ¶ 38 ("If parties believe any existing exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance.").

Second, because an analysis of a cable system's compliance with the channel occupancy rules would be highly fact-intensive, a merger proceeding is a particularly inappropriate forum for raising such unsubstantiated generalized allegations. For example, to minimize consumer confusion and disruption to existing programming relationships, the Commission grandfathered all vertically integrated video programming services carried on systems as of December 4, 1992 that exceeded the Commission's channel occupancy limits.[175] This grandfathering – which runs to the system and continues indefinitely – alone makes any generalized assertions about channel occupancy violations untenable. In short, given the way the rules operate, one cannot (as Bell Atlantic suggests) simply look at a cable system's channel lineup, match up the services in which the relevant cable operator has an attributable interest, and divide the number of such matched services by the system's total number of activated channels to determine whether the system has exceeded its channel occupancy limit. If Bell Atlantic or any other party believes that an AT&T system has exceeded the limit, it is free to identify the system with a specific complaint and specific factual allegations. As no party has initiated such a complaint, the Commission should not entertain Bell Atlantic's baseless speculations in this proceeding.[176]

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[175] *Channel Occupancy Order* ¶ 93; 47 C.F.R. § 76.504(d) ("Cable operators carrying video programming services owned by the cable operator or in which the cable operator holds an attributable interest in excess of limits set forth . . . as of December 4, 1992, shall not be precluded by the restrictions in this section.").

[176] AT&T notes that in the six years since adoption of the rules, not a single channel occupancy complaint has been filed (let alone an adverse decision rendered) against any AT&T cable system. *Cf.* Errata, *Applications of Craig O. McCaw, Transferor, and AT&T, Transferee, for Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, FCC 94-238, ¶ 152 (rel. Sept. 19, 1994) ("We find that the public interest would not be served by our withholding action on the proposed merger to conduct further fact finding based on the generalized allegations made by the Ad Hoc IXCs in this proceeding."); Memorandum Op. and Order, *AT&T Corp., et al., Joint Application for Authorization pursuant to Section 214 of the Communications Act of 1934, as amended*, DA 99-1637, 1999 WL 635709,

(continued . . .)

Unable to show even a colorable violation of the Commission's Rules, Bell Atlantic resorts to sophistry. It also argues that AT&T must count @Home and Road Runner as two channels each (*i.e.*, one for downstream traffic, a second for upstream signals) for the channel occupancy rules. As the statutory language and Commission regulations make clear, the channel occupancy rules are designed to limit the number of channels on a cable system that can be occupied by a vertically-integrated *video programmer*.[177] Because the Commission has consistently held that Internet-delivered video is not "video programming" under the Communications Act,[178] *a fortiori*, ISP services such as @Home and Road Runner are not video programmers and therefore do not count toward a cable system's channel occupancy limit.[179] In addition, although Bell Atlantic's petition disputes the Commission's determination that ISPs do

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¶¶ 12-14 (Aug. 20, 1999) (denying allegations regarding volume discount abuses and directing the opponents of the license grant to "file a complaint with the Commission pursuant to section 208 . . . [which] should state the particular facts upon which the allegations are based.").

[177] *See* 47 U.S.C. § 533(f)(1)(B); 47 C.F.R. § 76.504(a).

[178] *See, e.g.*, *Fifth Annual Video Competition Report*, ¶¶ 102-105 (noting that "long form video programming offered by Internet video still remains less than broadcast quality"); Order on Reconsideration, *In Re Implementation of Section 207 of the Telecommunications Act of 1996: Restrictions on OTARD*, 13 FCC Rcd. 18962, ¶ 56 (1998) (stating that "video-related services," such as video over the Internet, have not been shown to be comparable to those provided by a television broadcast station).

[179] Bell Atlantic's contention that AT&T's exclusivity arrangements with @Home and Road Runner "strike at the heart" of the channel occupancy rules, Bell Atlantic at 11-13, are similarly unavailing. Because @Home and Road Runner are not video programmers under Commission precedent, these exclusivity arrangements do not even implicate, much less violate, the channel occupancy rules.

not provide video programming, this claim is not merger-specific. As such, it cannot be considered in this proceeding.[180]

d. Program carriage rules.

Bell Atlantic states that AT&T and MediaOne are already violating the program carriage rules by refusing to deal with ISPs other than their own affiliated @Home and Road Runner services.[181] Once again, Bell Atlantic's claim is groundless. The Communications Act and the Commission's rules clearly state that the program carriage restrictions govern agreements between MVPDs and *video programming vendors*.[182] Because, as discussed above, the Commission has consistently held that Internet services do not provide video programming, @Home and Road Runner are not "video programming vendors" that can form the basis of a program carriage discrimination complaint.[183] In addition, like its channel occupancy rule argument, Bell Atlantic's disputes with the Commission's determination have nothing to do with this Merger, and should be considered, if at all, as part of a formal rulemaking proceeding.[184]

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[180] In fact, the Commission is currently considering whether an ISP is a provider of video programming for purposes of the leased access rules. *See* Memorandum Op. and Order, *In re Petition of Internet Ventures, Inc. for Declaratory Ruling Regarding Whether Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Acts of 1934, as amended*, CSR-5407-L (1999). Bell Atlantic remains free to press its claims there.

[181] Bell Atlantic at 15-16.

[182] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[183] This same conclusion applies to Bell Atlantic's claim that AT&T's limitation on Internet video streaming violates the program carriage rules. Bell Atlantic at 16-17.

[184] Finally, even assuming *arguendo* that @Home and Road Runner did constitute video programming vendors, the proper forum for alleging improper discrimination is a complaint under the program carriage complaint procedures set out in 47 C.F.R. § 76.1302, not this license transfer proceeding.

B. The Merger Will Have No Anticompetitive Impact On MVPD Competition.

Bell Atlantic claims that AT&T and MediaOne should be prevented from consummating the proposed Merger because it would significantly reduce competition in the MVPD business.[185] The claim is specious.

First and foremost, actual competition between AT&T and MediaOne is *de minimis*. As Applicants explained in the Public Interest Statement (at 41), the areas in which AT&T and MediaOne have overbuilds is limited to less than 3,000 homes. Moreover, AT&T and MediaOne had – well in advance of announcement of the Merger – entered into transactions to dispose of several systems in areas where both companies had the *authority* to offer cable service.[186]

Bell Atlantic brushes off these previously disclosed divestiture plans by speculating that the parties may transfer the systems to a third party that has no desire or ability to provide service in the area, and by claiming that Applicants cannot rely on a sale to Time Warner because Time Warner is "no longer independent."[187] Both suggestions are meritless. No third party that purchases a cable system (whether with cash or other cable system assets) at today's prices is likely to let it stand idle. And, as demonstrated, *supra*, and in the Public Interest Statement, Time Warner, Inc. and TWE will be independent from AT&T and will have no conceivable incentive to favor AT&T.[188]

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[185] Bell Atlantic at 20-25.

[186] Public Interest Statement at 41 n.93.

[187] Bell Atlantic at 22.

[188] *See generally* Coffee Supp. Decl.

Unable to show that the Merger will have any material impact on competition, Bell Atlantic embraces the "potential" competition doctrine.[189] Bell Atlantic's invocation of the potential competition doctrine is highly ironic since Bell Atlantic has steadfastly maintained that this doctrine should be accorded little weight.[190]

More fundamentally, Bell Atlantic is simply wrong in asserting that the Commission's treatment of adjacent incumbent telephone monopolists has any bearing on this Merger. Cable companies, unlike ILECs, have been free to compete for years and are not "precluded competitors" – the focus of the Commission's potential competition analysis.[191] The fact that AT&T and MediaOne generally have not competed with one another is powerful evidence that they are not important potential competitors. And the Commission analysis Bell Atlantic references focuses on identifying "precluded competitors" rather than merely any possible potential entrants.[192]

But even if AT&T and MediaOne are "potential competitors," the Merger would still not have any anticompetitive effects. In the analytic framework the Commission adopted in the *BA-NYNEX Order*, it seeks to identify the "most significant market participants" – *i.e.*, a potential competitor that would (in the absence of the Merger) be likely to have substantial future

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[189] Bell Atlantic at 20-22.

[190] *See* Letter from John Thorne, Bell Atlantic, to Thomas Krattenmaker, FCC, CC Docket No. 98-184 (June 17, 1998).

[191] Memorandum Op. and Order, *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd. 19985, ¶¶ 60-62 (1997) ("*BA-NYNEX*").

[192] *Id.* ¶¶ 60-62.

competitive significance in the relevant markets.[193] But where there is actual competition or where "one of the merging parties has the same capabilities and incentives as a large number of other [potential] competitors, the loss of that one participant may be unlikely to remove much individual discipline from the market."[194]

Here, there are a large number of equally capable "overbuilders" – many of whom are already in the market. As discussed above and in the Public Interest Statement, there are now two DBS providers capable of offering service in direct competition with AT&T and MediaOne throughout the United States. The presence of DBS places a serious constraint on the exercise of market power by MSOs and this presence is only likely to increase in the future.[195] This is particularly true because there are no significant "switching costs" that prevent a DBS provider from winning a customer away from a cable operator. Cable customers do not generally own any cable-specific equipment and, because DBS satellites are already in orbit, the incremental costs of offering DBS service to a new customer are relatively small.

In addition, Bell Atlantic ignores the numerous other competitors entering the market. As explained in the Public Interest Statement, electric utilities, ILECs and wireless cable companies have all begun offering MVPD services. Moreover, they are much more significant potential competitors than MSOs given that they often already have competing last-mile facilities

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[193] *Id.* ¶ 65.

[194] *Id.* ¶ 65. *See also* Memorandum Op. and Order, *Applications of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd. 18025, ¶¶ 19-20 (1998) ("*MCI-WorldCom*").

[195] *See* Section II.A.2, *supra*.

in place.[196] By contrast, in order for AT&T or MediaOne to enter another market, they generally must deploy the headend facilities necessary to serve that entire market, or at a minimum (in those few instance where they can use existing headend offices), distribution hubs that serve tens of thousand customers. In economic terms, these alternative providers have already sunk most of the costs necessary to serve customers while MSOs must incur substantial incremental costs to serve new geographic areas.

C. The Merger Will Have No Material Impact On Competition Or Standards In The Provisioning Of Internet Or Internet-Related Services.

Opponents again call upon the Commission to require AT&T to offer "broadband access" to unaffiliated Internet service providers. The market leader in Internet services argues that AT&T and MediaOne will dominate Internet services,[197] despite its nearly 20-to-1 advantage in subscribers. Entrenched monopolists argue that AT&T and MediaOne will employ a host of strategies to kill competition.[198] The Commission has twice heard the same claims and twice rejected the same request.[199] As the Commission ruled just months ago in the AT&T/TCI license transfer proceeding, the forced access issues are not merger-specific, and Opponents' claims should be disregarded for that reason alone.[200]

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[196] Public Interest Statement at 50-54.

[197] AOL at 5-7.

[198] *See*, *e.g.*, Bell Atlantic at 43-54; Bell South at 5-10.

[199] *See 706 NOI Report* ¶¶ 45-46; *AT&T-TCI* ¶¶ 92-94.

[200] *See AT&T-TCI* ¶ 96 (forced access concerns "would remain equally meritorious (or non-meritorious) if the merger were not to occur").